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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: ONS21 Security Services

File: B-403067

Date: September 16, 2010

P.J. Rowdon for the protester.

Brian A. Darst, Esq., Odin Feldman Pittleman PC, for the intervenor.

Michael G. McCormack, Esq., Department of the Air Force, and John W. Klein, Esq., and Kenneth Dodds, Esq., Small Business Administration, for the agencies.

Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Under small business set-aside, where award was made to an offeror determined to be a small business by the Small Business Administration's (SBA) area office in response to a size status protest, contracting agency was not required under applicable regulations to terminate the contract based on a subsequent reversal of the area office's size determination by SBA's Office of Hearings and Appeals.

DECISION

ONS21 Security Services, of Edgewood, Texas, protests the award of a contract to Trinity Technology Group, Inc., of Fairfax, Virginia, under request for proposals (RFP) No. FA8630-09-R-5080, issued by the Department of the Air Force for communications security (COMSEC) support services for the Government of Pakistan. The protester contends that the agency improperly failed to terminate the award after the Small Business Administration's (SBA) Office of Hearings and Appeals (OHA) reversed a formal size determination issued by an SBA area office finding that the awardee qualified as a small business.

We deny the protest.

The agency published a presolicitation synopsis on the FedBizOpps website on August 31, 2009, announcing that the RFP would be issued under North American Industry Classification System (NAICS) code 541690, "Other Scientific and Technical Consulting Services," which has a small business size standard of \$7 million. Subsequent to the notice, the contracting officer determined that, since the RFP's performance work statement was more complex than those in routine COMSEC

procurements that used NAICS code 541690, it would be more appropriate to use NAICS code 541513, “Computer Facilities Management Services” (which has a size standard of \$25 million) for the procurement. On September 14, the agency published a combined synopsis/solicitation on FedBizOpps advising potential offerors that the applicable NAICS code for the RFP was 541513; however, the actual RFP document, attached to that notice, stated that NAICS code 541690 applied to the acquisition. The series of FedBizOpps notices published both prior to and after the submission of proposals all advised offerors that NAICS code 541513 applied to the procurement.

Two proposals were received, ONS21’s and Trinity’s, and both were rated technically acceptable. Trinity’s proposed price of \$4,533,881 was considered to be reasonable and in line with the prices in previous procurements of similar services; ONS21’s price of \$11,686,838.57 was also found reasonable for the effort proposed. The agency awarded the contract, for a 2-year base period and 3 option years, to Trinity on December 30, finding that its offer presented the overall best value. On January 4, 2010, the agency published an announcement of the award on FedBizOpps; that announcement noted that NAICS code 541513 was applicable to the award.

On January 11, ONS21 filed a timely size status protest with the contracting agency, alleging that Trinity was not a small business due to certain business affiliations. The contracting officer states that it was not until ONS21 filed the size protest that he recognized that the NAICS code listed in the RFP was not the code he had intended or announced in the FedBizOpps notices. In his referral of the protester’s size protest to the SBA, the contracting officer explained that, as he believed was evidenced in the various FedBizOpps announcements, he had intended the RFP to apply the higher (i.e., \$25 million) size standard of NAICS code 541513, rather than NAICS code 541690 (with its \$7 million size standard).

On January 25, the protester contacted the SBA area office, asserting that Trinity does not meet the small business size standard of NAICS code 541690, the code listed in the RFP. On March 12, the SBA area office issued a formal size determination that Trinity was a small business for the purposes of the current procurement; in its decision, the SBA area office concluded that the NAICS code applicable to the RFP was unclear and, pursuant to its authority under 13 C.F.R. § 121.402(d),¹ determined that the more appropriate NAICS code for the RFP was NAICS code 541513, under which Trinity qualified as a small business. In light of this decision, the agency proceeded with performance of the contract by Trinity.

ONS21 filed a timely appeal of the size determination with the SBA’s OHA on March 18; on May 12, OHA issued a decision reversing the SBA area office’s size

¹ This provision states: “[a]n unclear, incomplete or missing NAICS code designation or size standard in the solicitation may be clarified, completed or supplied by SBA in connection with a formal size determination or size appeal.”

determination for Trinity. The OHA decision, which did not review the propriety of the area office's decision regarding the awardee's alleged business affiliations or discuss which NAICS code more appropriately matches the performance work statement requirements of the RFP, ruled that the SBA area office's application of any NAICS code other than 541690, which was listed in the RFP, was improper. The OHA decision found that, since Trinity does not meet the \$7 million size standard associated with NAICS code 541690, it is not a small business under the procurement's terms.

ONS21 then inquired of the agency whether it was going to terminate the contract to Trinity. On June 2, the agency informed ONS21 that, although it had considered the OHA decision, it had decided not to terminate the contract. On June 4, ONS21 requested (and obtained) confirmation from the contracting officer that the award had been made applying NAICS code 541513. This protest followed on June 14.

As an initial matter, ONS21 raises several challenges that are untimely filed and thus not for our consideration. For example, the firm contends that it failed to receive a pre-award notice identifying the successful offeror; that Trinity wrongfully submitted a proposal under a NAICS code it did not meet; that the contracting officer improperly changed the applicable NAICS code after the submission of proposals; and that an award to Trinity under NAICS code 541513 was inconsistent with the NAICS code in the RFP. As stated above, the agency published a notice of its award to Trinity under NAICS code 541513 on the FedBizOpps website on January 4, putting prospective contractors, including ONS21, on constructive notice of the award (and the NAICS code applicable to the award) as of that date. See Herndon & Thompson, B-240748, Oct. 24, 1990, 90-2 CPD ¶ 327 at 3. The agency also provided an unsuccessful offeror debriefing to ONS21 on January 14.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under those rules, protests based on other than alleged solicitation improprieties must be filed no later than 10 days after the basis of protest was known or should have been known, except that for negotiated procurements involving a statutorily required debriefing, as here, such protests are to be filed no later than 10 days after the debriefing. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2010). Since ONS21 had information as early as January 4, from the FedBizOpps notice, and January 14, from its debriefing, to form the basis of its above-referenced protest contentions, its filing of these challenges with our Office approximately 6 months later renders them untimely.² Id.; See New SI, LLC, B-295209 et al., Nov. 22, 2004, 2005 CPD ¶ 71 at 2.

² ONS21's June 4 request for confirmation that the award was made under NAICS code 541513 does not revive the timeliness of the protest bases which were, or should have been known, months earlier from the FedBizOpps award announcement.

ONS21 protests that the agency acted unlawfully in choosing not to terminate the contract after it received the SBA OHA decision that Trinity was not a small business for the procurement under the RFP's NAICS code 541690.

Since the issue raised, regarding an SBA OHA's reversal of an SBA area office formal size determination after an award has been made, concerns a matter of interpretation involving SBA's regulations, we requested a report on the protest from SBA. SBA explains that the size protest and appeal procedures, at 13 C.F.R. § 121.1009, have been set up to allow for quick resolution of size status protests without unduly delaying procurements. SBA Report at 2. In this regard, the regulations state that an SBA area office formal size determination becomes effective immediately, and a contracting officer may award a contract based on that determination, 13 C.F.R. §§ 121.1009(g)(1), (2). SBA's regulations further instruct that if an award has been made, and the formal size determination is, as here, reversed upon appeal by the SBA OHA, the OHA decision is not to apply to that procurement, but, instead, is to have prospective effect only, unless the contracting officer chooses to apply the OHA's decision to the procurement. 13 C.F.R. § 121.1009(g)(3); see Jensco Marine, Inc., B-278929.7, Feb. 11, 1999, 99-1 CPD ¶ 32 at 4. Further, and consistent with the SBA regulations, Federal Acquisition Regulation (FAR) § 19.302(g)(2) provides that "[i]f an award was made before the time the contracting officer received notice of the [size determination] appeal, the contract shall be presumed to be valid." Accordingly, we conclude that, under the applicable regulations, since the SBA OHA decision here was received after award, there was no requirement for the agency to terminate the award to Trinity.³

The protest is denied.

Lynn H. Gibson
Acting General Counsel

³ The agency reports that, in view of the SBA's OHA decision, it will not count the award to Trinity toward its small business contracting goals, and, in deciding not to terminate the contract, it gave due consideration to the fact that continuity of performance had become vital, and that the protester's proposal at a price approximately 150 percent higher than Trinity's would exceed the customer funding.